United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

B Pgs

74-2610

To be argued by
E. THOMAS BOYLE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

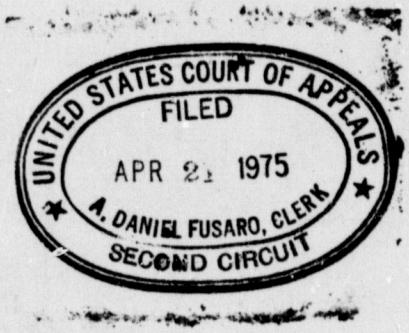
JAMES HENRY ROLLINS,
a/k/a LEE EVANS,

Appellant.

Docket No. 74-2610

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the District Court erred in denying appellant's motion to suppress (1) the passports seized during the 1971 search of his California apartment by Oakland police and (2) the items taken from his person pursuant to the warrantless arrest on the within charges.

2. Whether final determination of this appeal should be held in abeyance until the District Court passes on the merits of appellant's pro se petition for writ of habeas corpus; or, alternatively, whether any final decision on appeal should be without prejudice to appellant's pursuit of the issues raised in that proceeding.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable John M. Cannella) rendered on December 11, 1974, after a jury trial, convicting appellant of two counts of mail fraud (18 U.S.C. §1341) and sentencing him to concurrent terms of three and one-half years on each count to be served consecutively to a sentence imposed under the laws of the State of Missouri.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal,* pursuant to the Criminal Justice Act.

Statement of Facts

The indictment** charged appellant with two counts of mail fraud (Counts One and Two, 18 U.S.C. §1341), use of a fictitious name to commit a fraud involving the use of the mails (Count

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*At trial, pursuant to his own request, appellant was permitted to conduct his own defense with the assistance of assigned counsel. The latter was available for consultation and participated to a limited extent in the trial.

**The indictment is "B" to appellant's separate appendix.

Three, 18 U.S.C. §1342), and entering a bank to commit a larceny (Count Four, 18 U.S.C. §2113(a)).* The Government's theory at trial was that a former employee of the Kenyatta Avenue branch of the Standard Bank, Ltd., in Nairobi, Kenya, had mailed from Nairobi two forged "mail transfer" money orders of approximately $650,000 to the Avenue B branch of Manufacturers Hanover Trust Company in New York City. The money orders directed Manufacturers Hanover Trust to credit this sum to the account of Kodi's Domestic and International Enterprises, an account opened and maintained by appellant. Appellant, who was arrested at the bank on the day the funds were to have become available, claimed that this sum was a payment for a large shipment of wheat which he had arranged to be sent to Nairobi, Kenya, and that he was an innocent victim of the scheme.

A. The Motion to Suppress

Prior to trial appellant moved to suppress two passports which the Government sought to introduce into evidence for the purpose of showing that appellant had traveled to Kenya in 1971. These passports had been seized from appellant's apartment in Oakland, California, in 1971 during the execution of a police

*Count Four was dismissed at trial for insufficiency of evidence (267). Count Three was dismissed with the consent of the Government following a mistrial caused by the jury's inability to reach a verdict on that charge.

search based on an alleged search warrant issued by a California judge (5-7*). Appellant demanded that the search warrant and supporting affidavit be produced at the hearing. The Government complied by turning over unsigned and unsworn copies of the documents demanded.** Believing that appellant had the burden of producing these documents, the Court inquired whether the Government questioned the authenticity of the documents, which it did not (7-8).

What purports to be a copy of the search warrant issued pursuant to the affidavit authorizes a search of appellant's apartment for a "9 mm. pistol and ammunition therefore." A copy of a document that appears to be a police inventory which the Government also produced at the hearing reflects seizure of the passports as well as many other items not specifically authorized by the warrant.***

Appellant's motion to suppress based on the absence of probable cause was summarily denied (7).

Additionally, appellant moved to suppress all evidence flowing from his arrest on September 9, 1974, on the ground that the arrest was made without a warrant under circumstances

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*Numerals in parentheses refer to pages of the transcript of the trial, dated October 22, 23, and 24, 1974.

**The alleged search warrant and supporting affidavit are annexed as "D" to appellant's separate appendix.

***The inventory is "E" to appellant's separate appendix.

in which the postal authorities had had more than ample time to obtain one.*

At the suppression hearing, Agent Slovinski, an inspector of the United States Postal Service, testified that he was first informed of this case on September 6 by a representative of Manufacturers Hanover Trust, who reported the receipt of two mail transfer money orders involving substantial sums. A review of bank records reflected the home address and telephone number of appellant, whose account, Kodi's Domestic and International Enterprises, was to be credited with the money orders. That same day, through a Mr. Grant, the New York representative of Standard Bank, Ltd., Agent Slovinski learned that the money orders were forged (12-15). Later that same day Slovinski notified the office of the United States Attorney of the case and of his intention to arrest appellant at Manufacturers Hanover Trust on Monday, September 9 (14-15).

No attempt was made during the intervening period to obtain an arrest warrant (15). On September 9, upon entering the Avenue B branch of Manufacturers Hanover Trust, appellant was approached by Ms. Santa Romita, a bank supervisor who knew appellant had opened his account at the bank. Following prearranged instructions of Agent Slovinski, Ms. Santa Romita

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*As an additional ground for suppression, appellant maintained that the arresting officer, John Slovinski of the United States Postal Service, did not have probable cause to believe that appellant had committed a Federal felony.

asked appellant if he was Robert Cody and if he was there to pick up a substantial sum of money which had been forwarded from Nairobi, Kenya, in connection with the sale of wheat. Upon appellant's affirmative response to these inquiries, Agent Slovinski, who was seated at a desk nearby listening, placed appellant under arrest (11).

While the District Judge found that there was probable cause to arrest, no mention was made of the Government's failure to obtain a warrant (16).

B. The Government's Case

The Government's case against appellant was circumstantial. In an effort to show that appellant was a knowing participant in the scheme, the Government called twelve witnesses and introduced into evidence those items seized from appellant's person at the time of his arrest* as well as the passports taken from his apartment during the 1971 search by Oakland, California, police officers.**

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*These items consisted of an address book containing the name of Donald Okado Oodo, a former employee in the International Department of the Kenyatta Avenue branch of Standard Bank, Ltd., Nairobi, and a slip of paper containing the name and telephone number of Joseph Meehan, an officer of the International Department of the main office of Manufacturers Hanover Trust Company, with whom appellant was alleged to have had telephone conversations on September 3, 4, 5, and 6, 1974.

**In his opening statement the Assistant United States Attorney informed the jury that the passports were taken from appellant's apartment during a search in 1971.

Roseanne Santa Romita, a supervisor at the Avenue B branch of Manufacturers Hanover Trust Company, testified that appellant, under the name of Robert Cody, had maintained a business account at the bank for approximately a year in the name Kodi's Domestic and International Enterprises (64-66). Bank records received in evidence reflected that the telephone number of the business had been changed from 360-3295 to 260-8056* (91-93), and that the average monthly closing balance in the account was $200 to $500.

Joseph Portale, the Assistant Vice-President of the Avenue B branch of Manufacturers Hanover Trust Company, testified that some time at the end of August he had received two mail transfer money orders,** dated August 21 and 26, 1974, from the Kenyatta Avenue branch of Standard Bank, Ltd., in Nairobi, Kenya, drawn

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*Cornelius O'Donnell, a security officer for the New York Telephone Company, testified that toll call records of the company (Government Exhibit #12) reflected that a call to Kenya was placed from 260-8056 on September 4, 1974 (199).

**The mail transfer money orders and the mailing envelopes, dated and postmarked "Nairobi," were received in evidence as Government Exhibits #1-A and 1-B and #2-A and 2-B (59). The bank officers, Giles Noronha and Neville Cassimi, whose signatures and code numbers the instruments purportedly bear, testified that these were not their signatures (137-139, 164). Norohana further stated that this was not the appropriate bank form for overseas transfers (140-141).

on the "Wheat Marketing Board" in the amounts of $301,000 and $352,000 (57-60).* Upon receipt of the mail transfer money orders in question, he referred them to the bank's International Department, which is located at the bank's main offices (60), and they were handled by Joseph Meehan, a Vice-President of the bank.

Upon receiving the money orders, Meehan verified appellant's account at the Avenue B branch and, on September 3, telephoned the number he had obtained from the bank's account records. Meehan testified that he spoke with a person who identified himself as Robert Cody, who confirmed that he was expecting a substantial sum arising from a transaction involving some wheat in Kenya. Meehan stated that he informed appellant that he was unfamiliar with the "Wheat Marketing Board," which was the drawer of both instruments, and that he would therefore have to refer the matter to his supervisor (94-96). Meehan further testified that on September 4, 5, and 6, 1974, he received telephone calls from appellant inquiring whether the funds were yet available (96).

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*Portale testified that he received these from his secretary in the morning mail. The usual bank procedure was for the postman to deliver the mail to Portale's secretary, who would sort and deliver letters to specific persons in the bank and give to Portale all mail addressed to the bank in general (57). Cross-examination established two additional sources for incoming mail -- a door slot and a night depository box -- into which correspondence can be dropped without resorting to the mails (62).

Agent Slovinski testified that he first got involved in the case on Friday, September 6, when he met with Joseph Meehan (114-115). Slovinski stated that he heard the telephone conversation between Meehan and appellant on the day appellant inquired about the processing of the money orders (114-115, 116, 129). Slovinski told Meehan to tell appellant that the money would be available on September 9. Slovinski further stated that he was present in the bank on September 9 and placed appellant under arrest immediately after the conversation appellant had with the supervisor, Ms. Santa Romita (116-117), which he overheard from a nearby desk.

The Government introduced into evidence an address book taken from appellant's person at the time of the arrest (Government Exhibit #9) (117-118), together with a piece of paper containing Meehan's name and telephone number at the bank (Government Exhibit #8) (119-120). The address book contained a listing for a "Mr. Zini, P.O. Box 48976, N.K. 556101." Testimony by Giles Noronha, an officer of the Kenyatta Avenue branch of Standard Bank, Ltd., revealed that, based on a Nairobi telephone directory produced at trial, P.O. Box 48976 was held by Donald Okado Oodo, a former employee of the Kenyatta Avenue branch of Standard Bank, Ltd., whom the bank had discharged approximately a year earlier (147-148). Agent Slovinski testified that at the arraignment appellant asked him to return the address book and, in Slovinski's presence, appellant pointed to Mr. Zini's name and instructed his wife to contact Zini and advise him of

what had happened (236-238).

Sergeant Fred Farkas, a police officer from Oakland, California, testified that he had participated in the search of appellant's apartment at 9917 99th Avenue Court on September 24, 1971,* and had seized two passports** (195). Both passports were received into evidence (Government Exhibits #5-A and #6-A). The Assistant United States Attorney immediately directed the jury's attention specifically to Government Exhibit #6-A, which contains travel stamps indicating a visit to Kenya during July and August 1971*** under a passport bearing appellant's photograph but the name "Lynwood Evans."****

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*Appellant's motion for a mistrial based on the obvious implication of prior misconduct, which this testimony caused, was denied (190-191). No corrective instructions were requested, nor were they given by the Court sua sponte.

**Copies of the passports are annexed as "E" to appellant's separate appendix.

***In summation, the Government argued that this exhibit was proof of the opportunity to make contacts later used to commit the fraud charged in this case (313).

****Government Exhibit #5-A bore the name John Rollins and appellant's photograph. This passport did not reflect travel to Africa.

The introduction of the passports raised the issue of appellant's dual identity, which led the Government to call two witnesses to explain appellant's use of the names "James Henry Rollins"* and "Lynwood Evans." Edward Hunvold, a professor of law and the dean of admissions at the University of Missouri Law School, identified appellant as a former law student who, under the name "James Henry Rollins," attended for four semesters between 1965 and 1967 (171-172).** Sigred Lewis testified that she knew appellant when he lived in Oakland, California, in 1971, where he used the name "Lee Evans" (181-182).***

This constituted the Government's case.

C. The Defense Case

In his defense, appellant called two witnesses. Rochell Wendell, the acting superintendent of the building where appellant lived, testified that she knew him as Robert Cody (248),

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*In addition, Donald Mooney, a fingerprint analyst for the United States Postal Service, testified that the fingerprints of James Rollins and Robert Cody were of the same person (205-206).

**Additionally, Hunvold stated that he knew a "Lynwood Evans" who was a law student at the University of Missouri between 1967 and 1969 (173).

***The Government also introduced the application for the passport issued under the name "Rollins" (Government Exhibit #5-B), and two applications for a passport in the name "Evans" (Government Exhibits #6-B and #6-C). Thomas Donovan, a handwriting analyst with the Postal Service, testified that a comparison of the handwriting on these two applications with known specimens of appellant's handwriting revealed that, in Donovan's opinion, the same person wrote all of them (221).

and that he maintained a business in the basement of the apartment building where he and two others, George Fountain and James Movrell, operated a workshop where they put designs on shirts (251-253). George Fountain substantiated Wendell's testimony, and further stated that the business, called Fandango Designs, used the bank account of Kodi's Domestic and International Enterprises (256-262).

After summations and the Judge's instructions,* the jury found appellant guilty on two counts of mail fraud.

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*The charge is "C" to appellant's separate appendix.

ARGUMENT

Point I

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS (1) THE PASSPORTS SEIZED DURING THE 1971 SEARCH BY OAKLAND, CALIFORNIA, POLICE AND (2) THE ITEMS TAKEN FROM HIS PERSON PURSUANT TO THE WARRANTLESS ARREST ON THE WITHIN CHARGES.

1-A. The California search warrant was issued without probable cause.

In 1971 Oakland, California, police entered appellant's apartment pursuant to a search warrant issued by a California judge and seized, among other things, two passports, each containing appellant's picture but each issued in a different name. The warrant had been issued solely on the basis of the supporting affidavit of Conrad Blevins, which states:

> That the said articles, items and property are described particularly as follows, to wit:
>
> 9 mm. pistol and ammunition therefore
>
> That the following facts establish the existence of grounds for the issuance of a Search Warrant and further establish probable cause for believing that said grounds exist:
>
> Affiant is a Sergeant of Police attached to the Homicide Section of the Criminal Investigation Division of the Oakland Police Department and is engaged in the apprehension of persons responsible for homicides.
>
> On the afternoon of September 23, 1971,

Affiant was advised of a double shooting at 1255 99th Avenue in the office of the Garden Manor Square Apartments and that Isaac Lewis and Isaac Green were the victims.

Affiant thereupon went to said address and personally observed the two mentioned victims lying on the floor of the office in a pool of blood and observed eight 9 mm. empty shell casings littering the floor of the office. A 9 mm. pistol was not found at the scene. (SEE OVER).

[Form affidavit interrupted at this point].

Both victims were dead. In the course of his investigation, Affiant spoke with Ronald Williams of 720 Weld Street in the City of Oakland who stated to Affiant that he had been in the vicinity of the office aforementioned and had heard a series of shots coming from the direction of the office and had then observed Lee J. Evans who was personally known to him run from the office carrying a brief case and disappeared from his view in the direction of an apartment which he knows Lee J. Evans to live in located on 99th Avenue Court.

Affiant further was advised by the Pacific Telephone and Telegraph Company that the phone Number 569-2219 is leased to a Lee J. Evans at 9917 99th Avenue Court.

On September 24, 1971, Affiant personally spoke with Willie Hale of 9923 99th Avenue Court who told Affiant that he knows that Lee J. Evans lives at 9917 99th Avenue Court in the City of Oakland with a girlfriend by the name of Deborah Miles. Said Willie Hale further told Affiant that he works as a maintenance man at Garden Manor Square Apartments and knows that Deborah Miles rents said apartment at 9917 99th Avenue Court in the City of Oakland.

Affiant is further advised and believes from his own experience that 9 mm. pistols are easily disposed of and therefore requests a nighttime execution of the warrant.

[Form affidavit resumed.]

WHEREFORE, affiant prays that a Search Warrant issue commanding that an immediate search be made of the person(s) of the said Lee J. Evans and the [illegible] and the premises and buildings described herein for the articles, items and property above described and that the same be brought before a magistrate and disposed of according to law.

_____

Affiant

Subscribed and sworn to before me on September 24, 1971

_____

Judge of the Court, County of Alameda, State of California.

Appendix D.

The supporting affidavit fails to establish probable cause for issuance of the warrant.

In Aguilar v. Texas, 378 U.S. 108 (1964), the Court held that where an informant's information is relied upon to establish probable cause for the issuance of a search warrant, the supporting affidavit must establish within its four corners two prerequisites: (1) There must be sufficient evidence to establish that the information was obtained by the informant in a reliable way; and (2) there must be sufficient evidence that the one who provided the information is reliable.*

*This requirement is satisfied when the supporting affidavit sets forth the record of past reliable performances, e.g., that the informant has provided information on specified prior occa-

In the event the supporting affidavit fails to meet either of these prerequisites, the court must determine whether the supporting affidavit reflects sufficient corroboration through independent police investigation. Spinelli v. United States, 393 U.S. 410, 417 (1969):

> If the magistrate decides that the tip cannot be credited in either of these two ways, the magistrate must then look to other parts of the affidavit to determine if the information compiled by independent police investigation sufficiently establishes probable cause.

In accordance with Spinelli, supra, United States v. Harris, 403 U.S. 573 (1971), requires that the supporting affidavit provide substantial basis for believing that the items sought are at the premises to be searched.

The supporting affidavit here makes no showing of prior reliability of the informant, Ronald Williams, and therefore fails to meet the second prong of the test set forth in Aguilar. The police had no prior experience with Ronald Williams (see Draper v. United States, 358 U.S. 307 (1959)), nor did Williams' statement constitute an admission against penal interests. United States v. Harris, supra, 403 U.S. at 583. Therefore, the issue here is whether, absent such proof, the police investigation was sufficient to corroborate the information Williams

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(Footnote continued)

sions which has led to the seizure of illegal materials or to arrests resulting in conviction. See, e.g., United States v. Fantuzzi, 463 F.2d 683, 687-688 (2d Cir. 1972); United States v. Dunning, 425 F.2d 836 (2d Cir. 1969).

provided. The affidavit of Oakland Police Officer Conrad Blevins reflects that the only fact corroborated was that appellant lived at an apartment on 99th Avenue Court in Oakland. This is insufficient to meet the test. The independent investigation must, in some sense, corroborate that the items sought were at the premises to be searched. In Whitely v. Warden, 401 U.S. 560, 567 (1971), the Court stated:

> ... The additional information acquired by the arresting officers[*] must in some sense be corroborative of the informer's tip that the arrestees committed the felony or, as in Draper itself, were in the process of committing the felony.

Thus, this Court, in United States v. Dzialak, 441 F.2d 212 (2d Cir. 1971), which also dealt with an informant of unproved reliability (there, a railroad policeman) found sufficient independent corroboration in evidence that there had been a theft and that boxes for the same brand of items stolen appeared in Dzialak's trash.

While the police investigation here corroborated that a crime had been committed, any independent corroboration linking appellant to the killings was totally lacking. Absent a showing of Williams' prior reliability, there is no basis for

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*While the Court in Whitely addressed itself to probable cause to arrest, the Court in Spinelli, supra, stated that the same considerations apply to probable cause involving issuance of a search warrant. Spinelli v. United States, supra, 393 U.S. at 417, n.5. Thus here there must be independent corroboration connecting the weapon sought to appellant's apartment.

believing that Williams, who obviously knew appellant, was not lying when he stated that he saw him running from the building at the time of the killings. Since the police were unable to corroborate through independent police investigation a scintilla of evidence linking appellant to the killings, the search warrant should not have been issued, and it was error not to suppress the passports.

Appellant was severely prejudiced by the introduction of these documents. As the Government argued in its summation, the passport issued in the name "Lynwood Joseph Evans," bearing appellant's photograph and stamps indicating a trip to Kenya in 1971 (Government Exhibit #6-A), constituted documentary proof of "the opportunity to make the contacts that would later be used to commit the fraud that is the subject of this case" (313).

Moreover, the introduction of the passports based on the search of appellant's Oakland apartment by police there enabled the Government to get before the jury evidence of unrelated criminal activity which it otherwise could not have done. This undoubtedly served to arouse the jury's curiosity as to the reason the police had for searching appellant's apartment, a distraction clearly not relevant to a proper consideration of the issues involved in this case. On the other hand, the jury did not have to speculate at all concerning appellant's obvious criminal activity in applying for a United States passport under an assumed name (18 U.S.C. §§1541, 1542) and unlawful use of a passport (18 U.S.C. §1544).

Finally, were it not for the introduction of these passports, there would have been no basis for the handwriting analyst's expert testimony that established appellant was also a forger. The introduction of the passports was harmful, and, being an error of constitutional magnitude, the case should be reversed. Chapman v. California, 386 U.S. 18 (1967).

1-B. The search warrant authorized a search and seizure of a specific weapon and ammunition, and therefore seizure of the passports was without probable cause.

The inventory* of the items seized during the search of appellant's apartment reflects that the search, limited on the face of the warrant to a "9 mm. pistol and ammunition," was far wider than that authorized by the magistrate who issued the warrant. The seizure of items outside the scope of the warrant was tantamount to a warrantless search of appellant's apartment. The gross deviation from the terms of the warrant is a violation of the Fourth Amendment.

Thus, The Supreme Court, in Marron v. United States, 275 U.S. 192, 196 (1927), held:

> ... The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is

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*The inventory is "E" to appellant's separate appendix.

to be taken, nothing is left to the discretion of the officer executing the warrant.

While the Court, in Coolidge v. New Hampshire, 403 U.S. 443 (1971), extended the "plain view" doctrine (see Warden v. Hayden, 387 U.S. 294 (1967))* to include the seizure of items observed during the execution of a search warrant, the majority opinion reflects that Coolidge did not change the underlying principle on which Marron was based, and thus adhered to the long established prohibition against "general, exploratory rummaging in a person's belongings," Coolidge v. New Hampshire, supra, 403 U.S. at 467.

The search here should be controlled by Marron rather than by Coolidge. While the record does not reflect** the time the police spent in rummaging through appellant's apartment, the inventory of items seized, consisting of eighteen different categories of items including the seizure of several credit cards, an electric typewriter, keys, and address books, in addition to the passports, indicates that this search was general

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*In Warden v. Hayden, 387 U.S. 294 (1967), a case involving "hot pursuit" of an armed robber, the Court overruled the distinction between a search for "mere evidence" and one for "fruits" and "instrumentalities of a crime." Gouled v. United States, 255 U.S. 298 (1927).

**The record does not reflect how many police officers executed the warrant, how long they searched the apartment, or the manner in which the search was conducted. Appellant contends, however, that these inadequacies in the record resulted from the incomplete law research facilities which were available to him at Federal Detention Headquarters at West Street, where he was incarcerated from the date of his arrest. See Point II, infra.

and exploratory in nature, and thus in violation of the Fourth Amendment. United States v. Dzialak, supra, 441 F.2d 212.

1-C. The Government's production of unsigned and unsworn copies of what purport to be a California search warrant and supporting affidavit is insufficient to establish that the passports were lawfully seized.

Prior to trial appellant, who had been in custody continuously from the time of his arrest, moved to suppress the passports seized from his Oakland, California, apartment at a time when he was not home, which the Government intended to introduce at trial. At the outset of the suppression hearing, appellant called upon the Government to produce the California search warrant and affidavit on which it relied to establish the lawfulness of the search and seizure. The Government did not comply with appellant's demand; instead, it produced unsigned and unexecuted copies of what may or may not be a validly issued search warrant and supporting affidavit.* The District Court mistakenly believed that the burden was on appellant to produce these documents.

The Fourth Amendment provides:

> No warrant shall issue, but upon probable cause, supported by Oath or affirmantion.

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*See "D" to appellant's separate appendix.

Where, as here, the Government relies solely on what it contends is a validly issued California search warrant to support the lawfulness of the seizure of the passports, the Government is obliged to produce those documents which show compliance with the Fourth Amendment. Failing this, the Government must show that the search and seizure falls within one of the narrow exceptions to the requirements of the Fourth Amendment. See United States v. Mapp, 476 F.2d 67, 76 (2d Cir. 1973); see also Warden v. Hayden, 387 U.S. 294 (1967; Coolidge v. New Hampshire, supra, 403 U.S. at 449-484.

In this case, the Government failed to produce a valid search warrant or to show an exception which would authorize a warrantless search. Therefore, the passports were illegally seized and should have been suppressed.

2. The warrantless arrest of appellant under circumstances where there was ample opportunity and time to obtain a warrant was unlawful, and thus it was error to deny appellant's motion to suppress.

Appellant was arrested inside the Avenue B branch of Manufacturers Hanover Trust Company on September 9, 1974, by Agent Slovinski. Despite the fact that Agent Slovinski had virtually completed his investigation of the case on Friday, September 6, and had the requisite probable cause to obtain an arrest warrant, the record reflects that the Government made no attempt to obtain one. This constitutes a violation of the Fourth Amendment, and thus renders the arrest unlawful. United States v. Watson, 504 F.2d 849 (9th Cir. 1974); contra, United States v. Bazinet, 462 F.2d 982, (8th Cir. 1972).

The Supreme Court has continuously expressed its strong preference for warrants, whether it be to make an arrest (Terry v. Ohio, 392 U.S. 1, 20 (1968), Beck v. Ohio, 379 U.S. 89, 96 (1964)), or to conduct a search (Camera v. Municipal Court, 387 U.S. 523, 528-29 (1967); United States v. Ventresca, 380 U.S. 102, 105-106 (1965); Preston v. United States, 376 U.S. 364, 367-68 (1964)).

The Supreme Court most recently addressed itself to the issue of the necessity of obtaining a warrant of arrest in Coolidge v. New Hampshire, 403 U.S. 443 (1971). While finding it unnecessary to decide this issue,* the plurality opinion of Mr. Justice Stewart states:

> The case of Warden v. Hayden, supra, where the Court elaborated on 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances.
>
> (Id. at 481)

In express reliance on Coolidge, the Sixth Circuit in United States v. Watson, supra, 504 F.2d 849, held that the failure to obtain a warrant of arrest, absent exigent circumstances and where the Government had ample time to do so, constitutes a Fourth Amendment violation. The facts there are similar to the case at bar. The defendant was arrested by postal authorities in a restaurant without an arrest warrant although there was a period of six days when they had ample opportunity to obtain one.

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* This Court was afforded the opportunity to pass on the question of a warrantless arrest of a person in his home in United States v. Gaines, 460 F.2d 176 (2d Cir. 1972) on remand from the Supreme Court, 404 U.S. 848 (1971), where the Supreme Court vacated the judgment and remanded for consideration of this issue at the suggestion of the Solicitor General. The Court declined, invoking the concurrent sentence doctrine. United States v. Gaines, supra, 460 F.2d at 178; but cf., United States v. Botsch, 364 F.2d 542, 548-49 (2d Cir. 1966).

As in Watson, the Government below established no exigent circumstances to justify the warrantless arrest. By Friday, September 6, Agent Slovinski knew that the money orders were forged, had listened in on a telephone conversation which established appellant's participation in the scheme, and confirmed the name, address, and phone number of appellant from bank records. Moreover, Slovinski set up appellant's Monday morning visit to the bank for the purpose of arresting him at that time. The Government has failed to show any reason justifying its failure to obtain a warrant of arrest during the intervening period. Nor has the Government shown the existence of exigent circumstances* such as would justify a warrantless arrest.

The unlawful arrest required the suppression of those items seized from appellant's person following his arrest, to wit, the address book and Meehan's telephone number, in addition to the testimony by Slovinski that at the arraignment appellant requested the return of the address book and thereupon, pointing to the name "Mr. Zini," requested that his wife contact Zini and inform him what happened.

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*There is no showing that obtaining a warrant would have caused a delay which would have resulted in the likely loss of evidence (Mapp v. United States, 476 F.2d 67 (2d Cir. 1973)), nor was there a risk of escape (United States v. Titus, 445 F.2d 577, 578 (2d Cir.), cert. denied, 404 U.S. 957 (1971)), or hot pursuit (Warden v. Hayden, supra, 387 U.S. 294 (1967)).

Point II

FINAL DETERMINATION OF THIS APPEAL SHOULD BE HELD IN ABEYANCE UNTIL THE DISTRICT COURT PASSES ON THE MERITS OF APPELLANT'S PRO SE HABEAS CORPUS APPLICATION PURSUANT TO 28 U.S.C. §2255; ALTERNATIVELY, ANY FINAL DECISION ON APPEAL SHOULD BE WITHOUT PREJUDICE TO APPELLANT'S PURSUIT OF THE ISSUES RAISED IN THAT PETITION.

Appellant represented himself at trial, as was his legal right. United States v. Plattner, 330 F.2d 271, 273 (2d Cir. 1964); see also Glasser v. United States, 315 U.S. 60, 71 (1942). After his conviction, appellant filed a pro se application pursuant to 28 U.S.C. §2255 for writ of habeas corpus (S.D.N.Y., 75 Civ. 167*), on the grounds that the law library facilities at Federal Detention Headquarters, where he was incarcerated before, during, and after trial because of his inability to post bail, did not comply with the minimal due process requirements set forth in Younger v. Gilmore, 404 U.S. 15 (1971), and with the United States Bureau of Prisons Policy Statement 2001. 2(b). Accordingly, appellant maintains that his conviction here results from a denial of meaningful access to the courts, in violation of due process.

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*The pro se application is "G" to appellant's separate appendix.

The petition for writ of habeas corpus raises issues of fact which are not fully reflected by the record below.* Accordingly, appellant requests that a hearing be conducted.

Counsel is informed by the Pro Se Clerk of the Southern District of New York that, while this petition has not as yet been assigned to a judge of the District Court, it will be referred to Judge Stewart, who is currently considering a civil rights action, 75 Cr. 13, initiated by appellant pro se pursuant to 42 U.S.C. §1983 based on substantially the same allegations as those made in the habeas corpus petition.

Appellant accordingly requests that this Court either withhold final determination of this appeal pending a decision in the District Court on the issue raised in the habeas corpus proceeding or, alternatively, that any final decision this Court should reach on this appeal be without prejudice to appellant's right to pursue on an amplified record the issue raised in his petition filed pursuant to 28 U.S.C. §2255.

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*The only reference to this issue appears in a post-verdict "Motion for Necessities," reference dated October 30, 1974 (Document #4 to the Record on Appeal), wherein appellant requested "that a suitable law library be set up in the detention center so that he may do legal research pertinent to his case or some other means for getting the material he needs be worked out." This motion was denied by the District Court "except as presently available."

CONCLUSION

For the above-stated reasons, the judgment of conviction should be reversed and the case remanded to the District Court for a new trial.

Respectfully submitted,

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April 21, 1975

Certificate of Service

4/21/55, 19

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

E. Tedo Boyle